

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1303

To be argued by
ALLEN R. BENTLEY

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1303

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALPHONSE RICE,

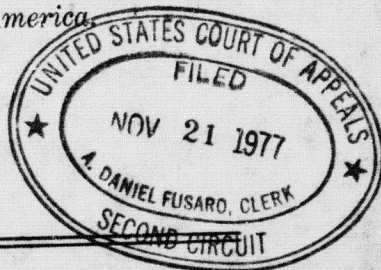
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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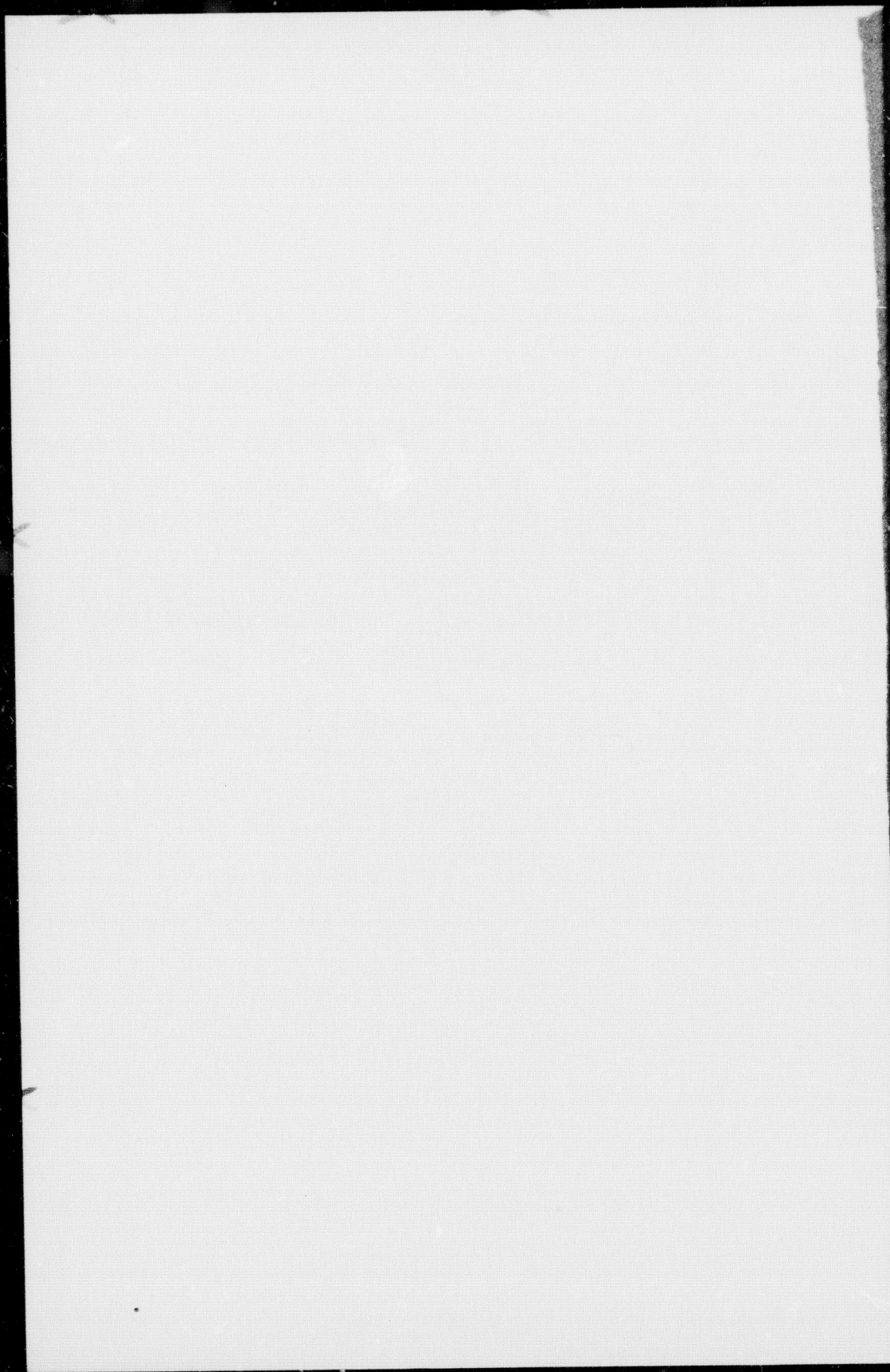


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1303

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALPHONSE RICE,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Alphonse Rice appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on June 10, 1977, after a four-day trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury.

Indictment 77 Cr. 125, a three-count indictment filed on February 16, 1977, charged Rice, in Count One, with conspiring to defraud the United States Veterans Administration ("the VA") and to commit violations of Title 18, United States Code, Sections 285 and 1001, in violation of Title 18, United States Code, Section 371. Count Two charged Rice with the unauthorized removal of his own claim file from the records of the VA, in violation of Title 18, United States Code, Section 285. Count Three charged Rice with falsifying, concealing and cover-

ing up a material fact in a matter within the jurisdiction of the VA, in violation of Title 18, United States Code, Section 1001.

Trial commenced on April 18, 1977 and ended on April 21, 1977, when the jury found Rice guilty on Counts One and Three and not guilty on Count Two. On June 10, 1977, Judge Brieant sentenced Rice to incarceration for a period of nine months on Counts One and Three, the sentences to run concurrently.*

Rice is enlarged on bail pending appeal.

Statement of Facts

A. Government's Case

1. Synopsis

Alphonse Rice was employed as a claims clerk in the education and training section of the adjudication division of the New York Regional Office of the VA ("VARO-NY"). Taking advantage of the position in which his job placed him, Rice conspired with his roommate, Landis C. Dothard, who was also a VA employee, to obtain for Dothard a substantial increase in VA benefits to which Dothard was not entitled. Rice used his position

* On November 23, 1976, Indictment 76 Cr. 1078 was filed charging Rice and two others with conspiring to violate 18 U.S.C. §§ 495 and 1708, in violation of 18 U.S.C. § 371, and with five counts of possessing checks which had been stolen from the mails, in violation of 18 U.S.C. § 1708. On January 20, 1977, Rice entered a guilty plea to the conspiracy count of that indictment before the Honorable Lee P. Gagliardi, who sentenced Rice on February 17, 1977 to a period of two years' probation. The sentence imposed by Judge Brieant in the case on appeal was made concurrent with the sentence imposed by Judge Gagliardi.

in the VA to falsify, conceal and cover up Dothard's ineligibility for the increase.*

The fraud charged in this case involved the awarding of an unwarranted increase in payments to a veteran under the VA educational assistance program, which furnishes monthly subsistence payments to veterans engaged in approved courses of study. As provided by statute, the amount of the stipend depends on the number of credit hours for which the veteran is enrolled and the number of his dependents. As of September 1, 1974, a single veteran engaged in a full-time education program was entitled to \$270 per month, whereas a veteran enrolled in such a program and having four dependents was entitled to \$410 per month. (P.L. 93-508; Tr. 121-22; (GX 36).** Since the amount of educational assistance to which a veteran was entitled changed as he gained or lost dependents, administrative procedures were created at VARO-NY to process appropriate adjustments in benefits when requested to do so, in writing, by the veteran. When the evidence surrounding an increase in benefits awarded to Dothard by Rice in May 1975 was viewed in the context of these procedures, it was clear that Rice had abused his position of trust within the VA by giving Dothard an

* On March 2, 1976, Dothard was indicted in Indictment 76 Cr. 220, which charged him and "others to the Grand Jury known and unknown" with conspiring to violate 18 U.S.C. §§ 285, 287, 1001 and 1505 and 38 U.S.C. § 3502, in violation of 18 U.S.C. § 371 (Count One) and with making false statements in a document filed with the VA on April 15, 1974, in violation of 18 U.S.C. § 1001 (Count Two). Dothard pled guilty to Count Two and was sentenced by Judge Ward to 60 days' incarceration, to be followed by three years' probation. Dothard has finished serving the custodial portion of his sentence.

** Subsequent references to the trial transcript, Government exhibits, defendant's exhibits, appellant's brief and appellant's appendix will be abbreviated as "Tr.", "GX", "DX", "Br.", and "A.", respectively.

increase in benefits which was not only fraudulent, but which was unsupported by any documentation from Dothard. A weakness in the VA's system permitted the scheme to succeed until a clerical error in the processing of an earlier, unrelated claim by Dothard led to discovery of circumstantial evidence establishing that the crime in this case had been committed.

2. The Operation of the VA Educational Assistance Program

Robert Schmidt, chief of the education and training section at VARO-NY, explained the system by which applications for increased educational assistance payments based on new or previously-unclaimed dependents were processed in 1975. Such applications could be made either on an official VA form, Form 686-C, or by letter containing the information needed to process the claim. (Tr. 99-100, 126-27; GX 47). When such forms and letters arrived at VARO-NY, the documents would be taken to the division which had custody of the veteran's claim folder ("C" folder), where a file clerk would "marry" the application to the "C" folder by attaching it to the top of the folder by a paper clip. (Tr. 53-54, 117, 136, GX 53). The "C" folder and application document were then delivered to the education and training section, where the unprocessed folders were stored in chronological order on shelves. (Tr. 129). Claims clerks in the education and training section would obtain unprocessed applications from the shelves, taking the oldest first. (Tr. 129). The 35 to 50 claims clerks were located in two rooms. The clerks in one room handled terminal digits 00 to 50; those in the other room, 51 to 99. Except for the general division of work between the two rooms, clerks in the education and training section were not assigned to specific terminal digits. (Tr. 133).

Having obtained the application for increased benefits and corresponding "C" folder, the claims clerk would process the application. If the application were granted by the clerk, an amended award would be written on a VA Form 22-1997-2, or "scan sheet." (Tr. 135-136; GX 46A). The adjudicator would enter on the scan sheet the veteran's claim number, his first initial and first three letters of his last name (his "stub name"), the beginning and ending dates of the award being amended, and other information, such as the reason for the change in award and, if additional dependents were claimed, their birth dates. (Tr. 140-42). The employee who processed the application would sign and date the scan sheet. (Tr. 142). The original or "hard copy" of the scan sheet would be attached to the outside of the "C" folder, while the single carbon copy of the sheet would be placed inside. (Tr. 136). The folder would then be taken to a breakdown area. There the top copy of the scan sheet would be "stripped" from the folder and placed into a cardboard box. (Tr. 137). After Schmidt or an assistant had reviewed the accumulated scan sheets to make certain that they appeared to have been prepared correctly, the sheets would be sent to the VA Data Processing Center in Hines, Illinois, where each would be scanned by a computer, generating an increase in the amount of the veteran's monthly check. (Tr. 137-38). In examining the scan sheets for flaws in preparation that would lead to rejection by the computer, Schmidt did not seek to verify that the corresponding "C" folder was in the breakdown area. (Tr. 138). Nor was there any other mechanism to insure that for each scan sheet placed in the box for submission to the Hines, Illinois, computer, VARO-NY had the veteran's "C" folder and 686-C form or other underlying application document. (Tr. 138).

"C" folders from which the scan sheets had been stripped were placed on a table (Tr. 150) and eventually returned to the inactive files, which were organized nume-

rically by terminal digits. (Tr. 64). The "C" files of employees at VARO-NY for whom no award action was pending were kept at the Newark, New Jersey, Regional Office of the VA. (Tr. 152). The "C" files of VA employees who were receiving educational benefits were segregated and kept in locked cabinets in the section chiefs' offices. (Tr. 152). The file of an employee who was not receiving benefits when he began working for the VA, however, would not be transferred to a secure status if he later began receiving benefits, unless he notified the VA or his beneficiary status was otherwise brought to its attention. (Tr. 96, 181-82).

Government witnesses described the mechanisms—sequence checks, the Beneficiary Inquiry Records Locator System ("BIRLS"), and weekly circularizations—by which the VA sought to maintain proper organization of its millions of "C" folders and to correct human errors in the filing process. At VARO-NY, each file clerk was required to conduct a sequence check of one bin of files each day, physically verifying that the folders, as grouped by terminal digits, were in correct order. As a result of such daily sequence checks, each file cabinet at VARO-NY was checked twice a year. (Tr. 154-55). Similarly, the VA's Newark Regional Office conducted an annual sequence check of all its files. (Tr. 252). Folders found to be misfiled were checked against the circularization list and returned to the proper place in the files. (Tr. 252-53). Through BIRLS, the VA maintained a centralized computerized record of the whereabouts of all "C" folders, immediately accessible to VARO-NY and other offices throughout the country via cathode ray tubes and print-out devices. (Tr. 78, GX 57, Tr. 153, GX 58, Tr. 253, GX 154). Finally, folders were often located through the circularization process, whereby the VA's 58 duty stations were required to check their files for each of the missing folders listed on a weekly notice. (Tr. 155; GX 38A-D).

3. The Evidence of the Rice-Dothard Conspiracy

The fraud perpetrated by Rice and Dothard so ingeniously took advantage of the privileged positions and knowledge that they had as VA employees that in the ordinary course of business at VARO-NY it would have gone entirely undetected. However, human error on the part of a clerk who innocently processed an "emergency" check for Dothard in March 1975 led to the investigation, indictment and conviction of both men.

Martin J. Hurban, Chief of Operations of the Finance Division at VARO-NY, testified that the Hines Data Processing Center sent a list of possibly irregular payments—payments for which the data submitted did not match that already contained in the computer—to VARO-NY and other VA stations each month. (Tr. 55-56). A \$1230 check to Landis C. Dothard, Social Security number 072-42-2240, dated March 27, 1975, appeared on the list of questionable payments dated July 16, 1975. (Tr. 57; GX 25, 32, 33). Hurban requisitioned Dothard's "C" file and was told there was no record of such a file. (Tr. 63). Hurban went in person to the place where the file should have been stored and found no file. (Tr. 63). Hurban asked another VA employee about the Dothard file and was told that Dothard was an employee in the Veterans Service Division at VARO-NY. (Tr. 64).^{*} After obtaining Dothard's "C" number and correct Social Security number (072-42-2420),^{**}

^{*} Personnel records produced at trial established that Dothard had been continuously employed at the VA since April 6, 1970, though not in the claims section, where Rice worked. (GX 102).

^{**} The inadvertent transposition of the seventh and eighth digits of Dothard's Social Security number apparently led to a discrepancy within the records maintained by the computer, and to the inclusion of the \$1230 check on the suspect payment listing.

Hurban checked the VA's master records and found that between April 1, 1974 and July 1, 1975, Dothard had received 17 VA educational assistance checks totalling more than \$10,000. (Tr. 78; GX 15-31, 35A-C). VA records listed Dothard as a student at the State University of New York at Stony Brook. (Tr. 82, 248; GX 49). From April 1, 1974 to May 9, 1975, Dothard received benefits as a married veteran with one child; on May 9, 1975, Dothard began receiving benefits in the amount paid to a married veteran with three children.* (GX 35). On June 13, 1975, Dothard received a check in the amount of \$803 representing payments allegedly due him resulting from the fact that his change in dependents was retroactive to September 3, 1974. (GX 30, 35).

About a week after Hurban initiated his investigation of Dothard, a VA employee and friend of Dothard's named Alphonse Rice came to Hurban's attention. (Tr. 68).** Hurban was instructed to determine what VA benefit payments, if any, Rice had received. (Tr. 68). Hurban found that between October 10, 1974 and August 1, 1975, Rice had received 14 VA educational assistance checks totalling more than \$4300. Payments to Rice had been made on the representation, later proved to be correct (Tr. 196), that Rice was enrolled as a student at the Taylor Business Institute. In October and November 1974, Rice received payments as a single veteran with no dependents. From December 1, 1974 to May 30, 1975, Rice was paid benefits for a married veteran with no children. From June 1, 1975 to August 1, 1975, Rice's subsistence payments equalled the amount paid to a mar-

* In addition to a series of recurring checks issued under his "C" number, Dothard received three "emergency" checks totalling \$3550 under his Social Security number. (GX 25, 28, 29). The duplicative nature of the payments which resulted was not detected by the VA computer.

** Rice's employment with the VA began on March 27, 1972. (GX 124-26).

ried veteran with three children. In addition, the adjustment in the amount of Rice's benefits was made retroactive to December 21, 1974, and a check dated May 14, 1975 in the amount of \$474 was issued to Rice compensating him for the additional benefits which he allegedly should have been receiving since that date.

In the course of Hurban's investigation, and later in preparation for trial of Indictment 77 Cr. 125, efforts were made to locate the "C" folders of Rice and Dothard. BIRLS indicated that Dothard's folder had been sent to VARO-NY from Newark on February 6, 1975. (Tr. 79; GX 57). When Hurban sought to locate Dothard's folder, however, he was unable to find it. (Tr. 64). Hurban's requisition for Rice's file was similarly fruitless. (Tr. 78). Antonio Correa Rodriguez, a control clerk at VARO-NY, testified that he had conducted a special search for the Rice and Dothard files shortly before trial. (Tr. 235-36). Rodriguez had checked the director's office, the contact division, the file units (Tr. 236), the locked files (Tr. 237), the Albany and Newark offices of the VA and the correspondence clerk's holding file. (Tr. 238). In addition, Rodriguez had looked for possible misfiles by checking various combinations and permutations of the two claim numbers at issue. (Tr. 239). Rodriguez did not find either file. Magdalene Geban, supervisor of the records section at the Newark Regional Office of the VA, testified that in August 1975, and again a week or two before trial, she had searched the Newark office for the Rice and Dothard files. (Tr. 251-52). Geban had not found either file. On two occasions, both files were nationally circularized. (Tr. 155-56). This procedure failed to produce any information as to the whereabouts of the files.

Although the "C" folders were not found, several documents not ordinarily filed within such folders were located. In a sub-basement storage area at VARO-NY,

Hurban found a VA Form 22-6553 dated April 15, 1974, submitted by Dothard to recertify his continued eligibility for VA educational benefits. (Tr. 86, 97; GX 41).^{*} Anthony J. Musso, an employee in the finance division at VARO-NY, obtained from the Hines Data Processing Center a scan sheet dated May 30, 1975 increasing the amount of Dothard's benefits by adding two dependents not previously claimed. (Tr. 197-98; GX 46; A. 16). The scan sheet was signed by "A. Rice." In May 1975, Rice was employed as a claims clerk in the education and training section at VARO-NY. (Tr. 128). Schmidt had made Rice his assistant, and among his other duties, Rice brought cases back and forth between the two rooms in which Schmidt's section was located, to assure an even distribution of work among the claims clerks. (Tr. 139).

Magdalene Geban at the Newark office of the VA found a VA Form 1726a dated September 25, 1974, effecting the transfer of Rice's "C" file from the Newark office of the VA to VARO-NY. (Tr. 215, 251; GX 42). Georgie Canty, a correspondence clerk at VARO-NY, testified that she had requisitioned Rice's file from Newark at Rice's request in September 1974, and that Rice had custody of the file after it arrived. (Tr. 216, 219). Finally, in the place at VARO-NY where Rice's folder should have been filed, VA officials discovered a charge-out card purporting to show that the folder had been permanently transferred to Newark on June 27, 1975. (Tr. 220, GX 44; A. 17). No Form 1726a was on file with respect to this transfer, and contrary to standard procedures BIRLS was never notified of it. (Tr. 221; GX 58).

It was stipulated that in an interview in the Office of the United States Attorney on October 7, 1976, Rice

^{*} This document formed the basis of Count Two of Indictment 76 Cr. 220, to which Dothard pled guilty.

had stated that he was single and had no children. (Tr. 193; GX 91).^{*} It was further stipulated that there was no record of Dothard's having been enrolled as a student at Stony Brook (Tr. 193; GX 92); that on March 26, 1975, Rice and Dothard had signed an application for an apartment at 123-33 83rd Avenue, Queens, New York (Tr. 211-12; GX 61); that on April 23, 1975, Rice and Dothard had signed a rider to a lease on an apartment at 123-33 83rd Avenue at a rental rate of \$464 per month (Tr. 211-12; GX 62, 63); and that Rice had signed the name "A. Rice" to the May 30, 1975 scan sheet authorizing an increase in Dothard's educational benefits due to two previously-unclaimed dependents. (Tr. 211-12; GX 46).

B. Defendant's Case

The defendant did not take the stand.

Rice's military service record was received without objection. (Tr. 279; DX C). It was stipulated that in 1974 and 1975, Rice was paid at the rate of \$10,278 per year, and that he accrued 104 hours of overtime in 1974 and 116 hours of overtime from January 1, 1975 to August 2, 1975. (Tr. 280).

^{*} This interview followed Rice's arrest on a charge of conspiracy to steal and possess mail and to forge the endorsements on Treasury checks stolen from the mails, which led to Indictment 76 Cr. 1078. See footnote p. 2, *supra*.

ARGUMENT

POINT I

There was Ample Evidence to Warrant Submitting Counts One and Three to the Jury.

Rice argues that the District Court should have granted his motion pursuant to F.R. Crim. P. 29 for a judgment of acquittal in that the evidence on Counts One and Three was insufficient to permit these counts to go to the jury. Contrary to this contention, the evidence was more than sufficient both as to the conspiracy charged in Count One and the falsification charged in Count Three.

In this case, the factual issues before the jury turned, not on the resolution of conflicting testimony, but on the reasonableness of inferences to be drawn from largely undisputed evidence. There was scant dispute about the fact that Dothard was not entitled to VA educational assistance in that he was never enrolled as a student at the State University of New York at Stony Brook. (Tr. 199). The parties stipulated that Rice, in the course of his duties as a claims clerk in the education and training section at VARO-NY, had signed a document—the scan sheet—awarding an increase in VA educational benefits to Dothard. (GX 46). There was considerable evidence that, despite substantial efforts by the VA, the application document, if any, on which Rice relied in writing the scan sheet had not been located. The central issue before the jury was whether or not the evidence established that Rice in preparing the scan sheet had acted “unlawfully, wilfully and knowingly,” as the indictment charged. The Government argued in summation that Rice’s conduct was criminal in that one could reasonably infer from the evidence that he had created

the scan sheet without having the requisite underlying documentation from Dothard. The defense argued that Rice prepared the scan sheet as a routine response to an application by Dothard and that Rice, not knowing of Dothard's actual ineligibility for the benefits involved, innocently followed the instructions of his supervisor by writing the award in reliance on the papers in the file.

The test to be applied in assessing the District Court's decision to let the jury resolve the conflicting factual contentions is not, as Rice contends, whether the evidence was "consistent with both innocence and guilt." (Br. 8). This Court has clearly stated that if either conclusion "[was] fairly possible, [the court] must let the jury decide the matter," *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972), quoting *Curley v. United States*, 160 F.2d 229, 233 (D.C. Cir.), cert. denied, 331 U.S. 837 (1947). The appropriate standard for review by this Court is "whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *United States v. Taylor*, supra, 464 F.2d at 243, quoting *Curley v. United States*, supra, 160 F.2d at 232; *United States v. Mejias*, 552 F.2d 435, 445 (2d Cir. 1977); *United States v. Braxer*, 482 F.2d 117 (2d Cir. 1973), cert. denied, 419 U.S. 1051 (1974). The evidence, when viewed in a light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 90 (1942), was clearly sufficient to permit a reasonable mind to find beyond a reasonable doubt that Rice had conspired with Dothard to award the latter unlawful VA benefits, and that Rice had falsified, concealed and covered up Dothards ineligibility for such benefits.

Rice routinely processed awards as part of his work as an adjudicator in the education and training section. The jury could thus infer that Rice knew that no effort was made to verify the existence of the underlying appli-

cation document after the scan sheet had been stripped from the "C" folder and placed in the box for shipment to Hines, Illinois. Schmidt testified that there was nothing to prevent a VA employee from dropping a scan sheet into the box without placing a "C" folder on the table beside it. (Tr. 138). As Schmidt's assistant, Rice was in a particularly good position to take such action without arousing the suspicions of other employees who might be present.

Analysis of the information set forth on the scan sheet itself showed that Rice's action in preparing it was not a unilateral step to accord Dothard an unexpected bounty, but action taken in furtherance of a criminal agreement to violate the law. Schmidt testified that the form in question would not generate a change in the amount of Dothard's monthly check unless Dothard's Social Security number, his school code, and the beginning and ending dates of his training were completed accurately. (Tr. 137-38). Since this information was correctly stated by Rice in preparing the scan sheet, with the result that a check (GX 30) was issued to Dothard, the jury could infer that Dothard had furnished the pertinent information to Rice to enable Rice to obtain the increased benefits for him.

The evidence showed that Dothard had good reason to bypass the usual procedure of filing a 686-C form seeking increased benefits. Schmidt's testimony established that had Dothard submitted a 686-C application, in the course of processing the application, the form would have been "married" to his "C" folder, which would then have been reviewed by a claims clerk. (Tr. 129,

134). Although the clerk was required to base his or her action solely on the papers in the file (Tr. 175), there was no guarantee that Dothard's repeated increases in educational benefits would not arouse the suspicions of a conscientious clerk. It was thus not unreasonable to infer that Dothard preferred not to submit fraudulent papers if a safer method of obtaining an unwarranted increase in his benefits could be devised.

There was abundant evidence to show that Rice had a motive to approve Dothard's increase in benefits without the proper documentation. On April 23, 1975—little more than a month before he signed the scan sheet at issue—Rice had signed rental documents with Dothard for an apartment in Queens at a rental rate of \$464 per month. VA benefit checks were mailed to Dothard at the Queens address on May 9, 1975 (GX 28), and to Rice at that address on June 16, 1975 (GX 12), from which the finding that both men had taken occupancy of the apartment at or about the time the scan sheet was signed is virtually inescapable. That Rice shared the apartment with Dothard not only tended to show that Rice had a stake in Dothard's financial well-being, but it corroborated testimony by Hurban and Canty that Rice and Dothard were friends. (Tr. 68, 222). Even in the absence of a potential legal liability for the entire rent due under the lease should Dothard be unable to keep up his share of the payments, Rice's friendship with Dothard itself gave him reason to enter into this conspiracy to obtain benefits to which Dothard was not entitled.

In short, to find Rice not guilty on the theory that at most he had innocently processed a fraudulent application submitted by Dothard, the jury was required to find that Dothard took the chance involved in submitting such an application; that of the 35 to 50 claims clerks in the

section where such documents were processed on a virtually random basis, his friend and roommate Alphonse Rice just happened to obtain it for processing from the shelves where unprocessed folders were stored; and—since the underlying document together with the balance of Dothard's "C" folder has never been found—that after the application had been routinely approved, either Dothard took the further risk involved in removing the papers from the files of the VA, or the documents were innocently, but irretrievably, misplaced.* When the improbability of each of those circumstances is considered, as it must be, *United States v. Brower*, 482 F.2d 117, 125 (2d Cir. 1973), *cert. denied*, 419 U.S. 1051 (1974); *United States v. Monica*, 295 F.2d 400 (2d Cir. 1961), *cert. denied*, 368 U.S. 953 (1962), in light of other evidence in the case—including evidence of Rice's own receipt of an improper increase in benefits due, like Dothard's, to non-existent dependents, discussed in Point II, *infra*—it is apparent that Judge Brieant did not err in submitting Counts One and Three to the jury.

* There was substantial evidence tending to show that the disappearance of Dothard's file, as well as Rice's, was hardly accidental. Canty's testimony demonstrated how easy it was for a VA employee who later began receiving benefits to gain access to his file, which would be kept under lock and key if the VA learned of his beneficiary status. Evidently typical weekly national circularization lists showed that, of approximately 500,000 "C" folders at VARO-NY, it was necessary to circularize only 19 or 20 in a four-week period. (Tr. 158-59). Although circularizations and sequence checks were a generally effective means of locating missing folders, these techniques had yielded no results in the nearly 20 months between discovery of the missing folders and the trial.

Rice is in error in asserting that his "C" folder was shown by the sign-out card (GX 42) to have been in the possession of the VA "as late as December 9, 1975." (Br. 5). No such entry appears on the sign-out card. BIRLS showed a Newark to New York transfer of Rice's "C" file on that date, but it was stipulated that the BIRLS notation referred to the transfer of a rebuilt, or replacement, "C" folder. (Tr. 276; GX 94).

The assertions Rice now makes as to the insufficiency of the evidence on Counts One and Three in large measure repeat factual contentions that were made, quite properly, in his closing statement to the jury. The fact that VA adjudication division employees other than Rice had awarded Dothard benefits on dates prior to March 18, 1975, when Rice was first assigned to the education and training section (Br. 9), did not, as a matter of law, preclude the jury from drawing inferences of unlawful conduct when the May 30, 1975 scan sheet was considered in light of all the evidence. Rice's contention that there was no evidence showing when he moved in with Dothard (Br. 2, 10) ignores the fact that Treasury checks, which were stipulated to bear his and Dothard's signatures, were mailed to both men at the address in question. (Tr. 211; GX 12, 28). Rice's claim that the joint income enjoyed by him and Dothard was more than sufficient to cover their rental obligation (Br. 9, 14) was equally a matter of fact for the jury to decide. Rice argues that there was no evidence that Dothard played any part in Rice's receipt of benefits. (Br. 8, 14). Since the evidence was sufficient to permit the inference that Dothard had furnished Rice with information necessary to the preparation of the scan sheet and had negotiated the resulting check, the Government was not required to prove reciprocal participation by Dothard in Rice's receipt of illegal benefits to make out the conspiracy charged. Rice faults the Government for not calling Dothard to provide direct evidence of the conspiracy. (Br. 10). The Government was under no obliga-

tion to call Dothard, however, for the existence of a conspiracy may properly be proved by circumstantial evidence. As the Supreme Court has noted,

"Circumstantial evidence . . . is intrinsically no different from testimonial evidence . . . In both cases, the jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt we can require no more." *Holland v. United States*, 348 U.S. 121, 140 (1954).

POINT II

The District Court Correctly Admitted Evidence of Rice's Improper Receipt of VA Educational Benefits.

Rice contends that the District Court erred in admitting evidence of VA educational benefits he received from October 10, 1974 to August 1, 1975. This evidence consisted of a stipulation as to Rice's statements to an Assistant United States Attorney on October 7, 1976 (Tr. 193; GX 91), the VA checks Rice received (GX 1-12), and an illustrative table summarizing the dates, amounts, and number of dependents and time period covered by each check. (GX 34). The admissions to the Assistant United States Attorney established that from October 10, 1974 to December 21, 1974, Rice's benefits were inflated by the inclusion of one non-existent de-

pendent and that from December 21, 1974, to August 1, 1975, Rice's benefits were inflated by the inclusion of four non-existent dependents, effective May 14, 1975. (GX 34). From such evidence, the Government contended in its closing argument, the jury could find that Rice had acted intentionally and knowingly in approving the Dothard increase. (Tr. 300). The District Court's decision to admit this evidence and the Government's use of it in summation were, we submit, entirely proper.*

Proof that Rice had received unjustifiably augmented VA educational benefits was expressly authorized by F. R. Evid. 404(b), which provides:

Other crimes, wrongs, or acts.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The overwhelming weight of authority in this Circuit, moreover, has long recognized that if its probative value outweighs its potential for unfair prejudice, F.R. Evid. 403, *United States v. Grady*, 544 F.2d 598, 604-05 (2d Cir. 1976); *United States v. Harvey*, 526 F.2d 529 (2d Cir. 1975), *cert. denied*, 424 U.S. 956 (1976); *United States v. Torres*, 519 F.2d 723, 727 (2d Cir.), *cert. denied*, 423 U.S. 1019 (1975), evidence of other crimes or "similar acts" is properly admitted, *see, e.g., United States v. Hayes*,

* The VA checks Rice received were mailed to two addresses—720 Nostrand Avenue, Brooklyn, New York (GX 1-11) and 123-33 83rd Avenue, Queens, New York. (GX 12). Thus here, as in *United States v. Bozza*, 365 F.2d 206 (2d Cir. 1966), the defendant could not have been charged in the Southern District of New York with the offense which the "similar act" evidence tended to prove. F.R. Crim. P. 18.

553 F.2d 824 (2d Cir. 1977); *United States v. Chestnut*, 533 F.2d 40, 49 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976); *United States v. Santiago*, 528 F.2d 1130, 1134 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); *United States v. Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). Proof of other crimes can be particularly probative of such intangible issues as a defendant's knowledge and intent, *United States v. Rosenwasser*, 550 F.2d 806 (2d Cir. 1977), and it is often indispensable where proof of motive is relevant as circumstantial evidence of guilt, *United States v. Deaton*, 381 F.2d 114, 117 (2d Cir. 1967).

In this case, it cannot seriously be contended that the Government sought to use the evidence of Rice's receipt of VA educational benefits "to prove the character of [Rice] in order to show that he acted in conformity therewith." The single reference made by the Government in summation to Rice's receipt of benefits was the proper argument that his receipt of an increase in May 1975 was circumstantial evidence of the absence of mistake or accident in processing a similar increase for Dothard.* Moreover, the

* Commenting on the improbability of the defense position that Rice merely processed a fraudulent application submitted by Dothard, the Government argued as follows:

"It is just a coincidence that out of all the claims clerks who were working in that particular unit, I think Mr. Schmidt testified there were 25 or 50 of them, this physical application by Landis Dothard, this phony form that he created, went to Al Rice, just on a coincidence that it was just happenstance? No, ladies and gentlemen. It's not reasonable. What is reasonable is that Rice was taking action to give Dothard the same kind of unauthorized increase in benefits which he himself received just a few weeks before, and those tables, 34 and 35, show within a one-month period both Rice and Dothard increased their benefits through some form of action, to the same level. And at the end of those increases they both received benefits at the rate of \$410 a month based on a veteran, a wife and three dependents." (Tr. 299-300).

District Court overruled the Government's objection to admission of a favorable evaluation contained in Rice's VA personnel file and rejected the Government's suggestion that admission of the evaluation "opened the door" to introduction of Rice's conviction on Count One of Indictment 76 Cr. 1078, which charged Rice with conspiracy to possess stolen United States Treasury checks. Cf F. R. Evid. 806. (Tr. 111-12; DX A). The Government later stipulated to the admission of Rice's favorable military service record. (Tr. 281; DX C). The net effect of the trial court's rulings and the Government's stipulation was thus to permit defense counsel to portray Rice as a man with an unblemished record who would not have committed the offenses charged. (Tr. 320).^{*} Even in the face of that contention, the Government did not employ the evidence of Rice's receipt of benefits to make the argument that since Rice had clearly defrauded the VA on his own behalf, he was more likely to have done so also on Dothard's. Instead, it confined its rebuttal to correcting factual errors by defense counsel and pointing out the inferences of guilt to be drawn from the evidence of the crimes for which Rice was indicted.

Since the "bad man" theory played no part in the Government's presentation, the sole issue on appeal is whether the probative value of the challenged evidence was "substantially outweighed" by its potential for unfair prejudice. Evidence that Rice had received unjustified VA educational benefits was probative because it shed substantial light on his intent in preparing and concededly

^{*} Defense counsel argued, *inter alia*, as follows:

"The act that he is accused of doing is a very stupid act. You saw that he rose from a private to a sergeant in perhaps a year, little over a year, and I think the gentlemen in this jury that were in the army will know the difficulty of that. He is conscientious." (Tr. 321).

signing the Dothard scan sheet. The defense asserted in its opening statement that Rice worked on Dothard's case "as one of the hundreds of files that came before him." (Tr. 39). Evidence that Rice repeatedly received and negotiated wrongfully-inflated checks minimized the possibility that Rice's signature on the scan sheet resulted from inadvertence, "mistake or accident," F.R. Evid. 404(b), and gave a jury a significantly better perspective on the single fraudulent scan sheet Rice was charged with preparing. *United States v. Chestnut*, *supra*, 533 F.2d at 50. Evidence that Rice began receiving increased educational benefit checks (for a non-existent wife and three non-existent children) on May 14, 1975, only sixteen days before the submission of the Dothard scan sheet, was also probative of his knowledge and intent. Rice's nearly simultaneous receipt of additional benefits to which he was not entitled constituted circumstantial evidence that he intended to provide Dothard with a similar unlawful increase.

In addition to its relevance to the conspiracy and false statement charges, evidence of Rice's fraud unquestionably had probative value in connection with Count Two, which charged Rice with unlawfully removing his own file from the records of the VA. The evidence showed that before any VA benefit payment could be made, the veteran's claim had to be substantiated by a document. (Tr. 99). The application documents were filed in the "C" folders at VARO-NY. The central records maintained at the Hines Data Processing Center consisted only of the scan sheet awards, written by adjudicators. (Tr. 183). A veteran in possession of his "C" folder therefore could destroy some of the most significant evidence of fraud. Since administrative errors resulting in innocent overpayments occurred occasionally at the VA, knowledge that his endorsement would appear on a fraudulently-obtained check was little deterrent to the veteran who had access to the underlying documentation. Rice's improper receipt

of benefits established his motive to commit the crime alleged in Count Two and permitted the inference that the disappearance of his "C" folder resulted, not from bureaucratic ineptitude, but from criminal conduct on Rice's part.*

The potential for unfair prejudice to be weighed against the manifest probative value of the evidence of Rice's educational benefit payments was slight indeed. To avoid creating the misimpression that Rice's benefits were wholly unjustified, the Government itself sought to establish—and then stipulated—that Rice was enrolled as a student at the Taylor Business Institute. (Tr. 196). Testimony that Rice had repaid to the VA the full amount of the overpayments to him attributable to non-existent dependents (Tr. 207) undoubtedly neutralized much of whatever unfavorable impression the questioned evidence may have initially made on the jury. Cf. *United States v. Cleary*, Dkt. No. 77-1107, slip op. 6329, 6333-35 (2d Cir. Oct. 20, 1977); *United States v. Matot*, 146 F.2d 197 (2d Cir. 1944).**

In any event, the task of balancing probative value against the possibility of unfair prejudice rested "squarely on the shoulders of the experienced trial judge," *United*

* In addition to the above evidence of motive and evidence of the careful manner in which the VA's records were maintained, see footnote, p. 16, *supra*, no Form 1726a was ever prepared and BIRLS was never notified with respect to the alleged final transfer of Rice's file to Newark. These facts, together with the similarity between the figures in which the transfer notation was written on the charge-out card and those on the "A. Rice" scan sheet, clearly warranted submission of Count Two to the jury.

** Redirect examination of Hurban, after Rice elicited the fact of his repayments to the VA, again focused the attention of the jury on the central issue in the case—Rice's largesse in disbursing Federal funds to Dothard—by establishing that Rice had paid nothing on Dothard's account and that Dothard owed the VA \$7000. (Tr. 207-08).

States v. Robinson, 560 F.2d 507 (2d Cir. 1977) (*en banc*). When the District Court has exercised its discretion to find that the probative value of the challenged evidence outweighs its potential, if any, for unfair prejudice, that determination will only in the rarest of cases be reversed on appeal. *United States v. Harvey*, 526 F.2d 529, 536 (2d Cir. 1975), *cert. denied*, 424 U.S. 956 (1976); *United States v. Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970). Judge Brieant's decision to admit the evidence of Rice's improper receipt of VA educational benefits should therefore be sustained.*

POINT III

Rice's Speedy Trial Rights Were Not Violated.

Rice moved prior to trial for an order dismissing the indictment on the ground that the Government had unduly delayed the presentation of charges against him, in violation of his rights under the Due Process Clause of the Fifth Amendment and F.R. Crim. P. Rule 48. On April 6, 1977, the District Court filed a memorandum and order denying the motion, holding, in part, as follows:

"When it appears that the charges were brought within the period provided by the applicable statute

* Rice complains that the jury was not given an instruction as to the limited purpose for which the evidence of his receipt of benefits was admitted. (Br. 17). Aside from the facts that defense counsel in his opening and in summation correctly told the jury that Rice was not on trial for fraud (Tr. 39, 310), and nothing said by the Government invited the jury to make improper use of the evidence, no limiting instruction was requested by the defense. Rice thus may not be heard to argue, on appeal, that a limiting instruction was required. *United States v. Natale*, 526 F.2d 1160, 1174 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *United States v. Papadakis*, *supra*, 510 F.2d at 295; *United States v. Bozza*, 365 F.2d 206, 214 (2d Cir. 1966).

of limitations, defendant must establish that pre-indictment delay caused substantial prejudice to his right to a fair trial, *and* that the delay was an intentional device to gain a tactical advantage over the accused. *United States v. Marion*, 404 U.S. 307, 325 (1971); *United States v. Mejias*, Dkt. Nos. 76-1384-1389; 76-1395 at p. 2284 (2d Cir. March 10, 1977). In this case such a showing cannot be made.

Here, the indictment was filed well within five years of the alleged criminal acts. Rice has not shown that he suffered any actual prejudice in preparing his defense to these charges. *United States v. Iannelli*, 461 F.2d at 485. He does not claim that any witnesses were lost, or that any documents or other evidence helpful to the defense were misplaced during the delay. While it is true that slightly more than one year passed between his grand jury appearance and the filing of the indictment, he has not shown that this period of delay has hindered his ability to defend himself."

* * * *

"In light of all the circumstances, the Court believes that the delay in obtaining the indictment was not unreasonably long. Nor is the delay traceable to some purposeful conduct on the part of the Government designed to gain an unfair advantage over Rice. Rather, the time was spent in digging up evidence which the Government had a rational basis for believing would prove incriminating as to Rice. Since there was no contrived procrastination by the Government, and no prejudice to Rice was established, his rights to due process of law were not violated by the delay. *United States v. Eucker*, 532 F.2d 249, 255 (2d Cir. 1976)." (A. 12-14).

Consideration of the facts of the pre-indictment period in light of the well-established standards governing claims that pre-indictment delay has violated the Due Process Clause compels the conclusion that Judge Brieant's denial of Rice's motion to dismiss was entirely proper.*

A. Events During the Pre-indictment Period

The following facts concerning the Government's actions during the pre-indictment period were established by the record and an undisputed affidavit submitted by the Assistant United States Attorney:

Hurban's discovery of possible fraud by Dothard, in mid-July 1975, led to investigation of Dothard, Rice, and two others—Richard C. Frazier and Lawrence Robinson—by the Investigation and Security Service of the VA and by the FBI. Both investigations began in September 1975. On September 22, 1975, Rice was interviewed, after having been given *Miranda* warnings, by two FBI agents. On September 24, 1975, Dothard was arrested by the FBI and charged with violating Title 18, United States Code, Section 1001.

The grand jury investigation which led to Rice's indictment was initiated on December 19, 1975. In connection with the investigation, on January 19, 1976, Rice was served with a subpoena to appear before the grand jury on January 26, 1976. Rice appeared as required and asked that counsel be assigned to represent him. Martin E. Gotkin was then assigned as Rice's counsel.

* Rule 48, relied on by Rice in the District Court and again on appeal, Br. 19, is inapplicable, since Rice was never arrested in connection with the charges contained in the indictment at bar. *United States v. Marion*, 404 U.S. 307, 319 (1971).

Rice's grand jury appearance was adjourned to February 13, 1976 so that he could confer with his attorney.

On January 27, 1976, a copy of the final report of the VA Investigation and Security Service on its investigation of Dothard, Rice, Frazier and Robinson was received by the Office of the United States Attorney for the Southern District of New York.

On February 13, 1976, Rice again appeared before the grand jury, asserted his privilege against self-incrimination and refused to give handwriting exemplars. Later on February 13th, Rice was ordered by Judge Motley to furnish the requested exemplars. By stipulation, Rice furnished the exemplars out of the presence of the grand jury on February 23, 1976.

On March 2, 1976, Indictment 76 Cr. 220 was filed charging Dothard, in two counts, with violations of Title 18, United States Code, Sections 371 and 1001. On March 15, 1976, Dothard entered a plea of not guilty and the case was assigned to Judge Ward.

On or about March 25, 1976, the exemplars which Rice had executed were submitted to a VA handwriting expert for comparison with certain of the questioned documents in the case, including GX 46, the scan sheet increasing Dothard's educational benefits. The handwriting expert was unable to render an opinion as to the authorship of the signature "A. Rice" on GX 46 based on the exemplars Rice had executed on February 23, 1976. Accordingly, on April 7, 8, 9, 12 and 13, 1976, Schmidt removed 25 scan sheets from work Rice had routinely prepared in the ordinary course of business at the VA. (Tr. 149; GX 121A-Y). These scan sheets were thereafter submitted to the VA handwriting examiner. On May 6, 1976, the Government received a further handwriting report identifying Rice as the author of the questioned "A. Rice" signature.

Dothard entered a plea of guilty to Count Two of Indictment 76 Cr. 220 on June 11, 1976. In the days prior to the entry of his plea, Dothard provided the Government with the first name and certain other identifying characteristics, but not the last name, of an individual whom he claimed would support his position that he was the victim of a vendetta. This individual, Dothard asserted, had told him that she had seen his VA claim file—which, he further asserted, contained exculpatory material—in the office of a supervisor at the VA. In light of this witness' purported testimony, Dothard charged, one should infer from the fact that his VA claim file was missing, not that he had taken it to prevent evidence of his fraud from coming to light, but that the authorities at the VA had suppressed it because it contained correspondence providing evidence of his innocence.

Through a check of VA personnel records, the Government was able to ascertain the full name of the alleged exculpatory witness to whom Dothard had referred. On June 17, 1976, a subpoena was issued to compel this individual to appear before the grand jury, on June 23, 1976. This subpoena could not be timely served on the witness inasmuch as she had left the employ of the VA. A new subpoena was issued, returnable July 16, 1976, and was duly served.

The witness failed to appear on July 16, 1976; that afternoon, however, she called the Assistant United States Attorney and stated that she had forgotten the appointment. On July 29, 1976, she was notified that her appearance had been rescheduled for August 5, 1976.

On July 27, 1976, Dothard was sentenced by Judge Ward to two months' incarceration, to be followed by three years' probation.

On August 5, 1976, the witness whom Dothard had called to the Government's attention testified in the grand

jury. The testimony of the witness revealed not only that Dothard's claim of suppression of evidence was a fabrication (in fact, Dothard had told the witness that *he* had taken custody of his claim file), but that Dothard had made statements incriminating Rice in similar conduct.

On October 6, 1976, Alphonse Rice, William Wilson and Beverly Walker were arrested in the Southern District of New York on charges of conspiring to steal Treasury checks from the mails and to forge the endorsements thereon, in violation of Title 18, United States Code, Sections 371, 1708 and 495. The Legal Aid Society was assigned to represent Rice; later, Leonard E. Ryan was assigned under the Criminal Justice Act. The Assistant United States Attorney assigned to the case arising from October 6th arrest was unaware of the pending grand jury investigation of Rice, and the Assistant United States Attorney assigned to that investigation was unaware of Rice's other legal difficulties.

The grand jury investigation of possible fraud committed against the VA by Rice proceeded with an attempt to obtain handwriting opinion on the issue of whether Dothard and Rice had signed certain rental documents pertaining to Apartment 2202 at 123-33 83rd Avenue, Queens, New York. For this purpose, the original documents in question were subpoenaed from the owner of the building and the City of New York. On October 21, 1976, the documents obtained pursuant to subpoena were marked as grand jury exhibits. On November 19, 1976, these documents and others were submitted to the VA handwriting expert for analysis.

On November 23, 1976, Indictment 76 Cr. 1078 was filed charging Rice, Wilson and Walker, in Count One, with conspiring to violate Title 18, United States Code, Sections 1708 and 495, and in Counts Two through

Six, with possessing five Treasury checks which had been stolen from the mails. On December 2, 1976, Rice entered a not guilty plea, and the indictment was assigned to Judge Gagliardi.

On January 11, 1977, the Government received a letter from the attorney who had been assigned to represent Rice in the grand jury, Mr. Gotkin, asking about the status of the investigation and suggesting—although no action was pending against Rice—that he intended to move to dismiss for failure to prosecute. The letter made no mention of the pendency of Indictment 76 Cr. 1078.

At approximately the same time as Mr. Gotkin's letter, the Government received a report from the VA setting forth the results of the handwriting analysis requested on November 19, 1976. The examiner found that Rice and Dothard had signed several of the rental documents. These results were presented to the grand jury on January 18, 1977.

On January 20, 1977, before Judge Gagliardi, Rice entered a plea of guilty to Count One of Indictment 76 Cr. 1078. Mr. Ryan appeared as Rice's attorney.

On February 16, 1977, Indictment 77 Cr. 125, was voted by the grand jury and filed with the District Court.

On February 17, 1977, Judge Gagliardi sentenced Rice on Count One of Indictment 76 Cr. 1078 to 60 days' incarceration; execution of sentence was suspended and Rice was placed on probation for a period of two years. Counts Two through Six of Indictment 76 Cr. 1078 were dismissed without opposition from the Government.

B. The Law Pertinent to the Speedy Trial Claim

It is well settled that dismissal of an indictment may be required by the Due Process Clause where the filing of the indictment has been delayed to the demonstrable prejudice of the defendant. *United States v. Lovasco*, 45 U.S.L.W. 4627 (June 9, 1977); *United States v. Marion*, 404 U.S. 307 (1971). However, the statute of limitations is a defendant's primary protection against weakened memories and other kinds of generalized prejudice arising from the passage of time during the pre-indictment period. *United States v. Lovasco*, *supra*, 45 U.S.L.W. at 4629; *United States v. Briggs*, 457 F.2d 908, 911 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972); *United States v. Capaldo*, 402 F.2d 821, 823 (2d Cir. 1968), *cert. denied* 394 U.S. 989 (1969). A showing of prejudice is necessary, but not sufficient, to obtain dismissal of an indictment for pre-indictment delay, since even if prejudice is shown the Court must also consider the reasons for the delay. *United States v. Lovasco*, *supra*, 45 U.S.L.W. at 4629. Here, the reason for the delay was a good faith investigation, which, under *Lovasco*, cannot be a violation of due process.

Contrary to Rice's characterization, Br. 19, the investigation of this case was not a "simple matter." No documents pertinent to Rice's fraudulent claim were found in the VA's records. Given administrative errors and the VA's practice of establishing overpayment accounts and reimbursing itself out of the veteran's later benefits, or occasionally waiving its claim to reimbursement for erroneous payments (Tr. 99), even if the Government could prove that Rice had received benefits in amounts to which he was not entitled, criminal prosecution might not have been justified. Similarly, the absence of Rice's "C" folder from the VA files, without more, was insufficient to warrant charging him with the crime of removing it.

The one possibly incriminating document found bearing what was apparently Rice's signature—the scan sheet—could not provide the basis for a criminal charge in the absence of unlawful knowledge and intent on Rice's part. Although another witness was later to testify that Dothard had possession of his own "C" folder, Dothard insisted on his innocence of most of the charges and claimed that his file had been suppressed by officials at the VA. Repeated submissions of documents to an analyst in Washington for expert handwriting opinion were needed to assure the correctness of any final action taken by the grand jury.* In sum, the careful analysis of the circumstantial evidence in the pre-indictment period in this case well illustrates how the deliberate pace of an investigation can redound to society's benefit by ferreting out the truly culpable. *United States v. Lovasco*, *supra*, 45 U.S.L.W. at 4630 ("Rather than deviating from elementary standards of fair play and decency, a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt"); *United States v. King*, 560 F.2d 122 (2d Cir.), *cert. denied*, 46 U.S.L.W. 3286 (Nov. 1, 1977); *United States v. Finkelstein*, 526 F.2d 517, 526 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976).

Rice seeks to cloak his speedy trial motion with apparent substance by citing three specific forms of prejudice allegedly stemming from the delay in the filing of the indictment—the fact that his eligibility for sentencing

* Rice's unwillingness to stipulate that the handwriting in question was his until the VA handwriting expert was actually called to the stand on the second day of trial (Tr. 209) demonstrates that the issue was a close one requiring careful evaluation in the pre-indictment period.

as a Young Adult Offender under Title 18, United States Code, Section 4216, lapsed; the claim that he lost the opportunity to obtain a favorable, joint disposition of Indictments 76 Cr. 1078 and 77 Cr. 125; and the contention that his memory dimmed with the passage of time. None of these elements of prejudice was presented to the District Court, either by affidavit from Rice or by offer of proof by his attorney. For that reason alone, they should be rejected. *United States v. Fuentes*, Dkt. No. 77-1083, slip op. 5883 (2d Cir. Sept. 1, 1977); *United States v. Braunig*, 553 F.2d 777 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3790 (June 6, 1977). Nor is any of the forms of prejudice now asserted, when considered on its merits, compelling enough to warrant dismissal of the indictment. Since Rice was born on December 6, 1949, his eligibility for Young Adult Offender treatment expired on December 6, 1975, when he celebrated his 26th birthday, which was before even the initiation of the grand jury investigation.* Rice's claim that an earlier

* Although the VA and F.B.I. investigations were initiated before Rice's 26th birthday, Rice has cited no case, and we are aware of none, holding that the failure of the Government to cut short an ongoing investigation in light of a target's impending 26th birthday renders an indictment which may later result invalid under the Fifth Amendment Due Process Clause. Certainly no such conclusion can be drawn from *United States v. Canniff*, 521 F.2d 565 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976), or *United States v. Roberts*, 515 F.2d 642 (2d Cir. 1975), cases not cited by appellant, in which this Court has considered claims that *post-indictment* delay resulting in ineligibility for Youth Corrections Act sentencing has violated a defendant's right to a speedy trial under the Sixth Amendment.

The assertion that Rice lost the advantage of a Youth Corrections Act sentence comes with ill grace from a man who by his own admission committed a second felony after the point at which he claims this matter should have been resolved. In this respect, Rice's claim under the Youth Corrections Act is a hollow one, for upon his second conviction he would have lost the very benefits which he claims were denied him by the Government's delay.

indictment in this case would have permitted "a more satisfactory plea arrangement or sentence," Br. 20, is not only speculation of a high order; Rice has primarily himself to blame for the separation of the two prosecutions, for after his October 1976 arrest, perhaps gambling that the VA fraud investigation would not result in further indictments, he did nothing to alert either Assistant United States Attorney to the matter being handled by the other.* Finally, the bald allegation that Rice's memory faded during the period that he was under investigation, Br. 21, is insufficient to warrant a finding that his constitutional rights were violated. *United States v. King, supra*; *United States v. Vispi*, 545 F.2d 328, 332 (2d Cir. 1976); *United States v. Payden*, 536 F.2d 541, 544 (2d Cir. 1976); *United States v. Finkelstein, supra*, 526 F.2d at 526.* Accordingly, the order of the District Court denying Rice's motion to dismiss the indictment should be affirmed.

* At sentencing on Indictment 76 Cr. 1078, Rice stood by as his attorney in that matter argued, successfully, that Rice should receive probation because he was denied due process in his separation from the VA and that "the problem here is work, the problem is that a guy lost a job, needed a job, was out of a job. That's what this all stems from." (Tr. of Feb. 17, 1977, 3, 10).

** Rice mistakenly argues that he was the subject of a "three year" investigation. (Br. 21). In fact, the grand jury investigation consumed 14 months, and approximately 18 months elapsed between the discovery of possible criminal conduct and the filing of the indictment. That period was substantially shorter than delays that have been held not violative of the Due Process Clause despite generalized claims of prejudice. *United States v. Marion*, 404 U.S. 307 (1971) (three years elapsed between the time when the United States Attorney learned of defendant's alleged criminal conduct and the filing of the indictment); *United State v. Iannelli*, 461 F.2d 483 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972) (delay of nearly five years between Government's discovery of unlawful acts and return of the indictment); *United States v. Capaldo*, 402 F.2d 821, 823 (2d Cir. 1968), *cert. denied*, 394 U.S. 989 (1969) (40 months' delay).

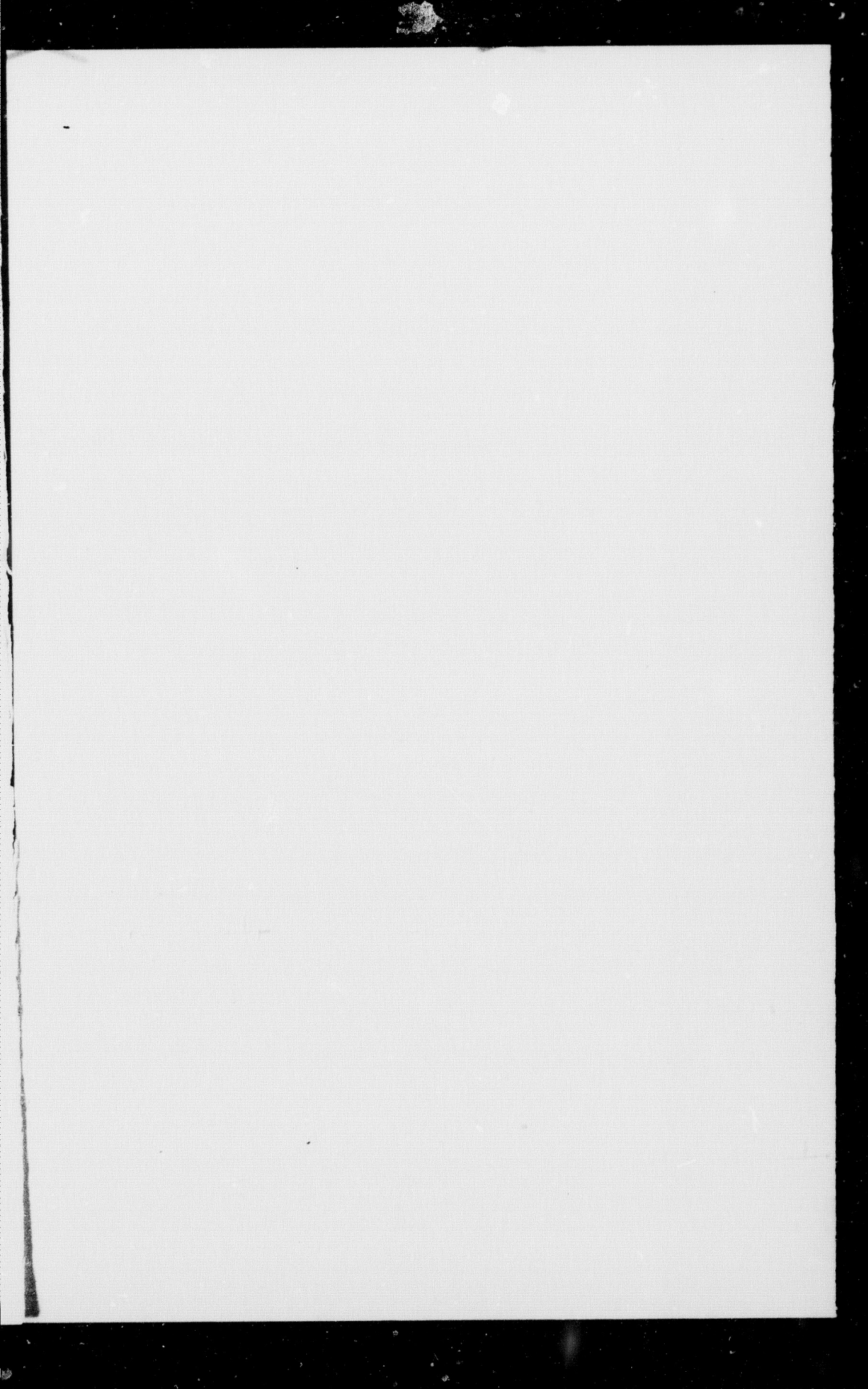
CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ALLEN R. BENTLEY, being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 21st day of NOVEMBER, 1977,
he served a copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

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11 PARK PLACE

NEW YORK, NEW YORK 10007

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
And w's Plaza, Borough of Manhattan, City of New York.

Allen R. Bentley

Sworn to before me this

22nd day of November, 1977

Alma Hanson

ALMA HANSON
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